Supreme Court, U.S.
FILED
02 890 DEC 10 2002
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No. 02-

IN THE

Supreme Court of the United States

CLARK COUNTY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

DERRICK EASON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State-created entity should be denied Eleventh Amendment immunity, even though a judgment against it will be satisfied from and have a direct impact on State funds, simply because the judgment against the entity would not impose direct legal liability on the State itself.

PARTIES TO THE PROCEEDINGS

Petitioners include Clark County School District (hereinafter referred to as "Petitioner CCSD"), Robert T. Henry, Beverly J. Minnear, Woodard Macke, and Mila Kitt.

Respondents include Shawn Witte, a minor, by his next friend and parent, Teresa Witte, and Derrick Eason, a minor, by his next friend and parent, Serena Eason. Respondents filed the underlying civil actions in this matter.

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Petitioners respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's opinions (per Roger L. Hunt, D.J.) granting Petitioners' motions to dismiss (Appendix ("Pet. App." 18a through 30a) are unpublished. The court of appeals' opinion (Raymond C. Fisher, C.J., joined by Stephen Reinhardt, C.J., and Donald W. Molloy, D.J.) reversing (Pet. App. 1a through 17a) is published at 303 F.3d 1137.

STATEMENT OF JURISDICTION

The Court of appeals entered its opinion and order on September 11, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution which states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

STATEMENT OF THE CASE

Respondents brought suit against Petitioners Clark County School District (hereinafter "Petitioner CCSD") and several of its employees in their individual and official capacities, including Robert T. Henry, Beverly J. Minnear, Woodard Macke, and Mila Kitt, alleging that Respondents were subjected to excessive corporal punishment while they attended Variety School. Variety School is a Nevada public school within the Clark County School District attended only by children with disabilities. Respondents attempt to state causes of action for: (1) violation of 42 U.S.C. § 1983 (alleging a violation of their constitutional right to substantive due process); (2) violation of 42 U.S.C. § 1983 (alleging a violation of their constitutional right to equal protection); (3) violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*; (4) violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; (5) violation of NRS 392.465 (a Nevada statute prohibiting corporal punishment in Nevada's school system); (6) assault; and (7) battery. Respondents sought to establish jurisdiction in the district court in the first instance based upon 28 U.S.C. §§ 1331, 1343(a)(3), 1367 and 42 U.S.C. § 12188(a)(1).

Petitioners moved to dismiss Respondents' claims on the grounds that Petitioner CCSD was an arm of the State of Nevada and, therefore, entitled to Eleventh Amendment immunity from Respondents' claims. The district court agreed and dismissed Respondents' claims. In doing so, the district court rejected Respondents' argument that pursuant to *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), Petitioner CCSD is not an arm of the State of Nevada because the State of Nevada was not legally obligated to satisfy a monetary judgment against Petitioner CCSD.

The district court further found that Petitioner CCSD was an arm of the State of Nevada because it was treated like a state agency by the State of Nevada.

The Ninth Circuit reversed the district court and cited *Regents of the University of California v. Doe*, for the proposition that the relevant inquiry "is whether Nevada will be legally required to satisfy any monetary judgment obtained against the District." The Ninth Circuit adopted this expansive interpretation of *Doe* despite the fact that opinion itself addressed only the narrow question of, "whether the fact that the Federal Government has agreed to indemnify a state instrumentality against the costs of litigation, including adverse judgments, divests the state agency of Eleventh Amendment immunity." *Doe*, 519 U.S. at 426 (holding that the entity was entitled to immunity). Notably, the Ninth circuit did not acknowledge the limited nature of *Doe*, nor did it properly consider the more general tests that this Court has announced for evaluating Eleventh Amendment immunity. *See, e.g., Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994).

The court of appeals' holding merits this Court's immediate review because the Ninth Circuit's requirement that Petitioner CCSD establish that the State of Nevada is legally obligated to satisfy a judgment against it to be entitled to Eleventh Amendment immunity exemplifies the disarray within the circuits over the proper inquiry to determine Eleventh Amendment immunity. Further immediate review is warranted because the Ninth Circuit's holding directly conflicts with other circuits which do not require and precedent from this Court which does not require a showing of legal liability on the part of the State to qualify for Eleventh Amendment immunity. Finally, the Ninth Circuit's holding

creates a split within the Ninth Circuit itself by effectively denying Nevada school districts the same Eleventh Amendment protection afforded those in California.

Background of Petitioner CCSD

Education in Nevada is primarily a matter of state concern. Indeed, the Constitution of the State of Nevada requires the State of Nevada to provide for a uniform system of common schools. Nev. Const. Art. 11, § 2. The Nevada Constitution further requires that the Nevada Legislature provide for a superintendent of public instruction to oversee its public schools, and pass laws to secure the general attendance of its schools. Nev. Const. Art. 11, § 1. Thus, it is clear from the Nevada Constitution that education in Nevada is a central government function.

Under the laws of the State of Nevada, the State exercises pervasive control over each of Nevada's school districts, including Petitioner CCSD. The Nevada Legislature statutorily created each of the school districts in Nevada and proclaimed their purpose to be to "administer the state system of public education." NRS 386.010(2) (1967). The Nevada Legislature, by statute, controls the term, manner of election, salary, and number of the board of trustees for each Nevada school district. NRS 386.120, NRS 386.180, NRS 386.190, and NRS 386.320. The Nevada Legislature controls the procedures and conditions under which a pupil can be suspended or expelled. NRS 392.465. It controls the courses that are taught in its public schools. NRS 385.110. It mandates certain types of transportation each school district is required to provide. NRS 388.060. It requires each school district to set aside a period of silence each day. NRS 388.075. It sets the minimum number of days and instructions and recognized holidays for each school district. NRS 388.090. It mandates

the information each school district must provide to the residents of each district every year. NRS 385.347. It provides a comprehensive system whereby Nevada's department of education reviews and evaluates the performance of every individual public school and pursuant to which inadequately performing schools are held directly accountable by the state.[1] NRS 385.363. The Nevada Legislature sets the licensing and qualification requirements for teachers. NRS 391.060 *et seq*. It requires school districts to have written contracts with licensed personnel. NRS 391.120. It provides a comprehensive system each school district must follow in determining the salary of its teachers and other employees. NRS 391.160. It sets forth the grounds for which a teacher or administrator may be suspended, demoted or dismissed. NRS 391.312. It mandates and provides for the frequency of performance evaluations for employees. NRS 391.3125. The Nevada Legislature controls the number of charter schools each school district may authorize. NRS 386.510. It established a state controlled fund for school improvement administered by the state superintendent of public instruction. NRS 387.032. The Nevada Legislature mandates by statute the minimum amount of money each school district must spend per year for textbooks, library books and supplies, materials relating to instruction, as well as for maintenance and repair of equipment, vehicles and building and facilities. NRS 387.207.

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1. Schools evaluated as "demonstrating need for improvement" must submit a plan for improvement to the Governor of the State of Nevada, among others. NRS 385.371. Nevada's department of education is responsible for preparing and supervising a plan for improvement for schools designated by the State as "demonstrating need for improvement" for two or more consecutive years, in addition to establishing a nine-member panel to supervise the school. NRS 385.373, NRS 385.375, and NRS 385.378.

Additionally, the Nevada Legislature also exercises pervasive control over the funding of each Nevada school district. The Nevada Legislature's funding scheme for its school districts, referred to as the "Nevada Plan" sets forth a funding scheme where each school district is guaranteed a minimum level of funding from the State based upon such factors as enrollment and the wealth of the particular school district.

Under the Nevada Plan, the Nevada Legislature sets the amount of property tax to be collected by each county for the support of the public schools within the school district, that figure is then deducted from the basic guarantee for that particular school district as determined by the legislature, the remainder is provided to the school district from state funds deposited in the State distributive school account. NRS 387.122 (1967). As recognized by the Nevada Legislature,

> the key to the Nevada Plan is the total guaranteed support level, which guarantees a minimum amount of resources will be available for a school district. To a limited extent, school districts can generate additional revenues beyond the guaranteed level; however, school districts have very little discretion in tax revenues. They cannot assess additional local sales taxes or increase property tax beyond the rate mandated by the state, except for capital outlay or school safety. Although school districts can generate certain non-tax revenues (rent, sales, tuition), these comprise an insignificant portion of their total budgets.

The Nevada Legislature prohibits any other taxation as a source of revenue for a school district with the exception of

a possible property tax for the sole purpose of raising funds for "enhancing the safety and security of the public schools." NRS 387.197.

The Nevada Legislature also exercises pervasive control over its school districts' ability to raise funding by issuing bonds. In fact, there is no provision authorizing Petitioner CCSD to issue bonds to satisfy a monetary judgment against it. By statute, school districts can only issue general obligation bonds for construction, design and purchase of certain facilities, remodeling certain facilities, purchasing furniture and equipment for schools, purchasing or retrofitting motor vehicles, or other transportation. NRS 387.335. It also limits the total bonded indebtedness a county school district can attain. NRS 387.400. The Nevada Legislature permits school districts to authorize medium term obligations for the purpose of meeting a great necessity. NRS 387.305. However, the executive director of the state department of taxation must approve such an obligation. NRS 350.089.

Based upon the pervasive control the State of Nevada exercises over Petitioner CCSD, Petitioners moved for dismissal of Respondents claims pursuant to the Eleventh Amendment. In the Ninth Circuit, whether an entity is an arm of the state for purposes of the Eleventh Amendment depends upon: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only the name of the state and; (5) the corporate status of the entity. *Mitchell v. Los Angeles*, 861 F.2d 198 (9th Cir. 1989).

Petitioners argued that the first and most important factor – whether a money judgment would be satisfied out of state funds – counseled strongly in favor of finding Petitioner CCSD to be an arm of the state because: (1) the funds available to satisfy a judgment were state funds under Ninth Circuit precedent, that is, funds received directly from the state commingled with revenue from property tax mandated and controlled by the State of Nevada; and (2) the State of Nevada so controlled and limited Petitioner CCSD's ability to satisfy a judgment that the state funds were practically impacted. *See Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 251-52 (9th Cir. 1992) (holding that locally raised funds commingled with state funds must be considered to be state funds and funding from property tax revenue raised pursuant to a state plan for school funding must also be considered state funds). The Ninth Circuit rejected these arguments finding that Petitioners were required to show that the State of Nevada would be legally obligated to satisfy a judgment against Petitioner CCSD.

REASONS FOR GRANTING THE PETITION

In recent years this Court has devoted a substantial amount of its time to the important issue of sovereign immunity and when Congress has validly abrogated states' sovereign immunity such that they can be sued in Federal Court. For example, this Court held that Congress did not have authority to validly abrogate states' sovereign immunity under the Fair Labor Standards Act in *Maine v. Alden*, 527 U.S. 706 (1997), under the Age Discrimination in Employment Act in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), under Title I of the Americans With Disabilities Act in *Alabama v. Garrett*, 531 U.S. 356 (2001), and is currently considering whether the Family Medical

Leave Act is a valid abrogation of states' sovereign immunity in *Nevada Department of Human Resources v. Hibbs*, Case No. 01-1368. However, while the Court has recently handed down several decisions detailing the scope and breath of the Eleventh Amendment, there has been no definitive guidance from this Court as to when an agency is so closely related to or directed by a state that it shares in that state's sovereign immunity. The consequence is that agencies such as Petitioner CCSD are left with confusing and conflicting appellate decisions applying the piece meal guidance that has been provided by this Court on the arm of the state doctrine and no clear guidance as to whether they are subject to such important legislation as the ADA, FLSA and ADEA. In view of the constitutional impact of these cases, it is of paramount importance that States have clear guidance as to when its agencies are entitled to immunity under the Eleventh Amendment.

Based upon the foregoing, this petition should be granted for two reasons. First, this petition should be granted because there exists no clear uniform standard to determine whether an agency, such as Petitioner CCSD, should be considered to be an arm of the state entitled to Eleventh Amendment immunity. Consequentially, the circuit courts apply a number of varying and often inconsistent multi-factored tests resulting in a situation where whether an agency is found to be entitled to Eleventh Amendment immunity depends more upon its geographic location than the merits of the case. Although the Ninth Circuit found Petitioner CCSD was not entitled to Eleventh Amendment immunity, it almost certainly would be entitled to such immunity in other circuits. This is clearly a circumstance that should not be tolerated.

Second, this petition should be granted because the Ninth Circuit like at least one other circuit, has incorrectly interpreted this Court's decision in *Regents of the University of California v. Doe*. Those two circuit courts have held that under *Regents of the University of California v. Doe*, whether the State is "legally obligated" to satisfy a judgment against the agency in question is the determinative factor in applying Eleventh Amendment immunity. This holding not only clearly exceeds the intent and holding in *Regents of the University of California v. Doe* but it also conflicts with this Court's holdings in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994) and *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 93-94 n.34 (1984). Moreover, this interpretation of *Regents of the University of California v. Doe* also creates a conflict amongst the circuit courts. The majority of circuits have interpreted the appropriate inquiry as whether a monetary judgment against the entity would have a practical or legal impact upon state funds. The result of this misinterpretation is that entities such as Petitioner CCSD are denied their constitutional right to Eleventh Amendment immunity. Relatedly, this petition should be granted because the Ninth Circuit's holding requiring Petitioner CCSD to establish that the State of Nevada is legally obligated to pay a judgment against it liability effectively deprives Nevada's school districts of the Eleventh Amendment protection afforded by the Ninth Circuit to California school districts in prior decision creating an intra-circuit conflict.

1. Certiorari Is Warranted Because Almost All Of The Circuits Have Adopted Their Own Unique Tests For Assessing The Eleventh Amendment Immunity Of Political Subdivisions, And This Court Should Provide A Uniform Test So That All State Entities Receive The Same Constitutional Protection.

The concept of the sovereignty of the States and their agencies and instrumentalities is a fundamental rule of jurisprudence having an important bearing upon the construction of the Constitution of the United States. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984). The particular question of whether a state agency or instrumentality is an arm of the state for purposes of Eleventh Amendment immunity is a question of federal law. *Regents of the University of California v. Doe*, 519 U.S. 425, 430 n.5 (1997). Despite its vital importance, federal court jurisprudence regarding how to apply the arm of the state doctrine for purposes of Eleventh Amendment immunity is recognized as being confusing, at best. *See Mancuso v. NYS Thruway Authority*, 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm of the state doctrine is, at best, confused.") and *Duke v. Grady Municipal Schools*, 127 F.3d 972, 980 (10th Cir. 1997) (recognizing that confusion exists in the area of Eleventh Amendment jurisprudence). This Court has never provided the circuit courts with definite guidance as to the factors relevant to determining when an entity is an arm of the state for purposes of Eleventh Amendment immunity.

The result of the piecemeal guidance that has been provided by the Court is the proliferation of varying multi-factored and sub-factored tests by most of the circuits and an inconsistent application of those factors in a manner

creating conflict among the appellate courts and with the precedent of this Court. This unnecessarily has led to an unacceptably imprecise and incorrect analysis of when an entity is entitled to Eleventh Amendment immunity. In this matter, the result is that despite the pervasive control and funding of Petitioner CCSD by the State of Nevada, it was wrongfully denied Eleventh Amendment immunity.

The most comprehensive guidance on this topic from this Court appeared in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The extent of this guidance was that the Court stated that the issue of whether the Mt. Healthy Board of Education is to be treated as an arm of the state "depends, at least in part, upon the nature of the entity crated by state law." In finding the Board was not entitled to immunity, the Court noted that the Board was defined by state law as a "political subdivision" and under Ohio law the State did not include "political subdivisions." The Court also noted that the Board was subject to some guidance from the State Board of Education and received a significant amount of money from the State, but that it had extensive powers to issue bonds and levy taxes.

Based largely upon *Mt. Healthy*, the following multi-factored tests have been developed by the circuits:

The First Circuit looks at: (1) whether the agency has the funding power to enable it to satisfy judgments without direct state participation or guarantees; (2) whether the agency's function is governmental or proprietary; (3) whether the agency is separately incorporated; (4) whether the state exerts control over the agency, and if so, to what extent; (5) whether the agency has the power to sue, be sued, and enter contracts in its own name and right; (6) whether the

agency's property is subject to state taxation; and (7) whether the state has immunized itself from responsibility for the agency's acts or omissions. *Wojcik v. Massachusetts State Lottery Commission*, 300 F.3d 92 (1st Cir. 2002).

The Second Circuit looks at: (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding on the state. *Mancuso v. NYS Thruway Authority*, 86 F.3d 289, 293 (2d Cir. 1996).

The Third Circuit looks at: (1) the source of funding; (2) the status of the agency under state law; and (3) the degree of autonomy from state regulation. *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999). The Third Circuit rejected whether the functions performed by the entity were typically state or local functions despite that various other circuits consider this factor because this Court found that factor to be unhelpful in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994).

The Fourth Circuit considers whether a judgment against the governmental entity would have to paid from the State's treasury and, if not, if the judgment would adversely affect the dignity of the State as a sovereign consisting of the consideration of: (1) the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys; (2) the scope of the entity's concerns – whether local or statewide – with which the entity is involved; and (3) the manner in which State law treats the entity. *Cash v. Granville County Board of Education*, 242 F.3d 219, 224 (4th Cir. 2001).

The Fifth Circuit considers: (1) whether the state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local as opposed to statewide problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether it has the right to hold and use property. *Southwestern Bell Telephone Company v. City of El Paso*, 243 F.3d 936, 938 (5th Cir. 2001).

The Sixth Circuit has no clearly enunciated factors.

The Seventh Circuit considers the extent of the entity's financial autonomy from the state which is determined by looking at: (1) the extent of state funding; (2) the state's oversight and control over the entity's fiscal affairs; (3) the entity's ability to independently raise funds; (4) whether the state taxes the entity; and (5) whether a judgment against the entity would result in the state increasing its appropriations to the entity, in addition to the entity's nature and general legal status, whether the entity's governing council or board of trustees are selected by the state Governor; what powers are granted to the entity, what power and control the state retains over the entity, and the primary purpose of the entity – to serve the whole state or only a region of the state. *Strykowski v. Northeast Illinois Regional Commuter Railroad Corp.*, 1994 U.S. App. LEXIS 16236 *9 (7th Cir. June 28, 1994) and *Kashani v. Purdue University*, 813 F.2d 843, 845-48 (7th Cir. 1987).

The Eighth Circuit considers nine factors: (1) local law and decisions defining the status and nature of the agency involved in its relation to the sovereign; (2) most importantly, whether the payment of the judgment will have to be made

out of the state treasury; (3) whether the agency has the funds or the power to satisfy the judgment; (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the agency's operations. *Sherman v. Curators of the University of Missouri*, 16 F.3d 860, 865 (8th Cir. 1994).

The Ninth Circuit considers: (1) whether a money judgment would be satisfied out of stated funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only the name of the state; and (5) the corporate status of the entity. *See Mitchell v. Los Angeles Community College District*, 861 F.2d 198, 201 (9th Cir. 1988). In *Eason v. Clark County School District*, the Ninth Circuit converted the first factor into an inquiry as to whether the State is legally obligated to satisfy a judgment against the entity. 303 F.3d 1137, 1142 (9th Cir. 2002).

The Tenth Circuit considers: (1) the degree of state control; (2) the characterization and definition of the entity in its enabling and implementing legislation; (3) state court interpretations and characterization of the entity; (4) the functions of the entity; (5) the fiscal independence of the entity; and (6) and the legal liability of the state for the entity's debts. *Duke v. Grady Municipal Schools*, 127 F.3d 972, 978 (10th Cir. 1997).

The Eleventh Circuit looks at: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; and (3) from where the entity derives its funds and who is responsible for judgments against the entity. *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000).

As evidenced by the foregoing, there is a glaring lack of consistency in the factors relevant to determining whether an entity is an arm of the State for Eleventh Amendment immunity purposes. For example, the Fourth and Fifth Circuits consider important whether the entity performs traditionally state or local functions, while the Third Circuit has expressly rejected this topic as a relevant inquiry. In addition, the Fourth and Seventh Circuits look at whether the scope of the entity's authority is statewide or only regional. Meanwhile, while in most circuits it is relevant whether the entity at issue can hold property in its own name, in the First and Eighth Circuits it is important to look at whether the entity's property is subject to taxation by the State. Also, the Second and Seventh Circuits are the only circuits to expressly name how the governing entities are appointed as a factor and in the Seventh Circuit, the inquiry is specifically whether the governing members are appointed by the Governor. Additionally, the Third, Fifth, Seventh and Eleventh Circuits expressly include the source of the entity's funding as a factor under the arm of the state doctrine.

Faced with such varying and inconsistent standards, the circuit courts often heavily rely upon dicta for their ultimate determinations as to whether an entity is an arm of the state. For example, here the Ninth Circuit concluded that Petitioner CCSD was not an arm of the state based upon the fact that:

> The Supreme Court has mentioned in passing that the Eleventh Amendment does not afford "local school boards" immunity from suit, *Missouri v. Jenkins*, 495 U.S. 33 n.20, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (1990), and in *Mt. Healthy*, the Court held an Ohio school district subject to suit because it was "more like a county or city than . . . like an arm of the State."

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 280 (1977). Clearly this unacceptably elevates form over substance. Additionally, the Ninth Circuit ignored the fact that not only is Petitioner CCSD funded primarily by direct and indirect state funds but that the State of Nevada is constitutionally and statutorily obligated to provide a specific minimum level of funding and support. *See Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 252 (9th Cir. 1992) (holding that locally raised funds subject to state control (such as property taxes) commingled with state funds must be considered to be state funds and funding from property tax revenue raised pursuant to a state plan for school funding must also be considered state funds). The issue of whether the entity is funded by the state or self-sustaining is of paramount importance to other circuits. *See Carter v. City of Philadelphia*, 181 F.3d 339, 348 (3d Cir. 1999) (finding the most important factor to be the source of funding for the entity). As a consequence, despite that entitlement to Eleventh Amendment immunity is a question of federal law, the practical result of the lack of guidance from this Court is that whether Petitioner CCSD is an arm of the state likely differs in different circuits. This is clearly an unacceptable result and additionally warrants review by this Court.

2. Certiorari Is Warranted In This Case Because The Ninth Circuit's Expansive Application Of *Doe* Deepens A Circuit Split On The Proper Test For Determining Whether A Political Subdivision Of The State Is Entitled To Eleventh Amendment Immunity.

a. Through Its Expansive Application Of *Doe*, The Ninth Circuit Has Adopted A Position That Is Inconsistent With Both This Court's General Precedent And The Specific Holdings Of Other Circuit Courts.

This petition should further be granted because the Ninth Circuit erroneously interpreted Regents of the *University of California v. Doe* by requiring that Petitioners establish that the State of Nevada was legally obligated to satisfy a judgment against Petitioner CCSD depriving Petitioners of their Constitutional right to immunity from this matter. It is generally agreed amongst this Court and the circuit courts that the most important factor in determining whether an entity is an arm of the state for Eleventh Amendment purposes is whether a monetary judgment would have a practical effect on the state treasury. *See Regents of the University of California v. Doe*, 519 U.S. 425, 430 (1997) (finding this factor to be of "considerable importance" to any evaluation of the relationship between the State and the entity being sued). In *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994), this Court clearly indicated that the appropriate inquiry under this factor is whether the state was "practically" or "legally" obligated to pay a monetary judgment against the state instrumentality. In furtherance of this inquiry in *Hess*, this Court examined whether the entity at issue was structured to be self-sustaining or dependent upon the state for funding. *Id.* at 261. Additionally, in

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 93-94 n.34 (1984), this Court considered as relevant to this inquiry the fact that funding for the county mental retardation program at issue came almost entirely from the State.

More recently, in *Regents of the University of California v. Doe*, this Court addressed the related issue of whether the fact that state funds were not vulnerable to a money judgment based upon an indemnification agreement or insurance coverage weighed against finding Eleventh Amendment immunity and held:

> with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant.

There is no indication in *Doe* that the Court meant to direct federal courts to disregard the "practical" impact of a judgment upon state funds as it considered in *Hess* and *Pennhurst*. In fact, this Court specifically stated that the narrow question it was deciding was whether the fact that a third party agreed to indemnify an entity for any monetary judgment against it deprived the entity of its Eleventh Amendment immunity. Yet at least two circuit courts since *Doe*, including the Ninth Circuit resulting in this petition, interpreted *Doe* to hold that the relevant inquiry as to whether a monetary judgment would implicate State funds depends solely on whether the State is legally obligated to satisfy a monetary judgment.

In the present case, the Ninth Circuit unequivocally adopted this unwarranted and erroneous interpretation of *Doe*:

> The Supreme Court stressed in *Regents of the University of California* that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant . . . Thus, the relevant inquiry is whether Nevada will be legally required to satisfy any monetary judgment obtained against the District."

Eason, 303 F.3d at 1142. The Ninth Circuit ultimately went on to find that this "most important factor" mitigated against finding Petitioner CCSD entitled to Eleventh Amendment immunity because Petitioners could not "demonstrate the State of Nevada bears a legal obligation to satisfy any adverse judgment against the District." *Id.* at 1144.

The Tenth Circuit also incorrectly interprets *Regents of the University of California*:

> We interpret *Doe* to require us to focus on legal liability for a judgment, rather than practical, or indirect, impact a judgment would have on a state treasury. As the Court specifically stated, "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." And while such a focus in some ways ignores economic reality, it also provides a clear and workable test in this very

> confused area of the law. It directs courts away from having to make case by case fact specific determinations of the practical impact on state treasuries."

Duke v. Grady Municipal Schools, 127 F.3d 972, 981 (10th Cir. 1997). The Tenth Circuit clearly interpreted *Doe* to mean that the most important factor to determine whether an entity is an arm of the State is whether the State is legally obligated to satisfy a monetary judgment against the entity. As a consequence, the Tenth Circuit in *Duke* found that the issue of the effect of a monetary judgment against the school district at issue in that case mitigated against finding it entitled to Eleventh Amendment immunity even though the Tenth Circuit recognized that it received 95% of its funding from the State and had no independent fundraising ability to satisfy a monetary judgment against it. *Duke*, 127 F.3d at 980.

The Ninth and Tenth Circuits' interpretation of *Doe* can only be read to reject the practical impact of a monetary judgment on State funds as an appropriate inquiry when determining whether an entity is entitled to Eleventh Amendment immunity. Such an interpretation directly conflicts with *Hess*, *Pennhurst* and the majority of other circuit courts. *See Mancuso v. NYS Thruway Authority*, 86 F.3d 289, 293 (2d Cir. 1996) (considering whether the entity at issue is legally obligated to satisfy a judgment, how the entity is funded, and whether a monetary judgment places the state treasury at risk); *Southwestern Bell Telephone Company v. City of El Paso*, 243 F.3d 936, 938 (5th Cir. 2001) (considering both the practical and legal effect of a judgment upon state funds including whether the majority of the entity's funding comes from the state);

Kashani v. Purdue University, 813 F.2d 843, 845-48 (7th Cir. 1987) (analyzing: (1) the extent of state funding; (2) the state's oversight and control over the entity's fiscal affairs; (3) the entity's ability to independently raise funds; (4) whether the state taxes the entity; and (5) whether a judgment against the entity would result in the state increasing its appropriations to the entity) and *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000) (considering from where the entity derives its funds and who is responsible for judgments against the entity).

Here, it is clear that any monetary judgment would have to be satisfied by State funds. The only funds available to satisfy a judgment are funds received directly from the State of Nevada commingled with revenue from property taxes, which because the property tax is mandated and controlled by the Nevada Legislature must also be considered to be State funds. *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 251-52 (9th Cir. 1992).

b. Through Its Novel Expansion of Doe, The Ninth Circuit Has, In Fact, Contradicted Its Own Precedent And Effectively Denied Nevada School Districts The Same Immunity Provided To California School Districts.

Additionally, this petition should be granted because the Ninth Circuit's holding creates an anomalous situation whereby its holdings grant California school districts Eleventh Amendment protection, but do not provide that same protection to the equivalently situated Nevada school districts. In *Belanger*, the Ninth Circuit held that the funding scheme of California school districts was so pervasively

controlled by the State that they were entitled to Eleventh Amendment immunity. This holding was based upon its conclusion that any local funds raised as part of the State's general funding plan for its school districts when "commingled" with funds received directly from the State lost their local characteristic and had to be considered State funds. *Belanger*, 963 F.2d at 252. The holding was further based upon its finding that local property taxes raised pursuant to California's funding scheme for its school districts also had to be considered to be State funds because the State has complete control over the amount of property tax revenue the school districts can raise and that revenue is simply credited toward the funding allocation from the State for each school district. *Id.* Nevada school districts, including Petitioner CCSD, are in an identical situation. The "local" funds they are allowed to raise as controlled by Nevada's funding scheme for school districts are commingled with funds received directly from the State of Nevada. Moreover, the State of Nevada has sole control over the amount of property tax Nevada School Districts can receive and simply uses that amount as a credit towards the amount of direct funding each Nevada school district will receive from the State. Notwithstanding these virtually identical circumstances, the Ninth Circuit's holding in this case deprives Nevada school districts of the Eleventh Amendment protection afforded California solely based upon its adoption of an improper interpretation of *Doe*.

Accordingly, the need for resolution of the conflict between the circuits regarding the appropriate inquiries as to whether a monetary judgment against the entity will be satisfied out of state funds and correction of the Ninth and Tenth Circuits misinterpretation of *Regents of the University of California v. Doe* warrants the Court's review of this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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